89-1947

No. 89-1947

IN THE

Supreme Court of the United States

October Term 1989

John Remington Graham,

Petitioner

vs.

William J. Wernz, Director
of the Office of Lawyers
Professional Responsibility
for the State of Minnesota,

Respondent

PETITIONER'S REPLY BRIEF

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Regrettably, the brief in opposition contains a number of irresponsible comments, some appealing to prejudice, others confusing the record or the issues, and all of them inexcusably far from the basic truth. Your petitioner desires to correct some of the more egregious of these misstatements.

1. On page 5 of the brief in opposition, counsel discusses a conversation between Steinbauer, an assistant county attorney under

Rathke, a county attorney, and Alderman, an independent lawyer in Brainerd, at a county bar assocation social event on the evening of December 11, 1987. Critical parts of Alderman's testimony concerning this conversation, in his deposition of May 2, 1988, of record in Minnesota Supreme Court File No. C3-88-1760, are reprinted on pages A64-A69 of the appendix to the petition for writ of certiorari:

Alderman was told that Milligan, counsel for Rathke in the Shockman case then pending in federal court, had contacted an influential intermediary who was close to McNulty, the presiding federal magistrate; that such intermediary had contacted McNulty; that, in consequence, the case was "taken care of, it was in the bag, the fix is on;" and that attorney's fees would probably be assessed against Graham, who now petitions for writ of certiorari.

Counsel refers to affidavits which

appear in Minnesota Supreme Court File No. C3-88-1760 as respondent's items 11 and 12. (N. B, the petitioner here was there designated as the respondent, and the respondent here was there designated the director.) These show Steinbauer denied recollection of any remarks, but Steinbauer's wife claimed she heard her husband say in effect that Graham is paranoid, and would claim corrupt influence.

Counsel does not dare to deny that Steinbauer and his wife had each consumed quantities of wine on that evening, and were both interested witnesses. Nor will she deny that Alderman was quite sober, being a member of AA, and a disinterested witness.

On the face of it, the alibi is so far-fetched as to be inherently unworthy of belief. Nor will counsel deny that, on pages 21-22 (reprinted on pages A67-A68 of the appendix to the petition for writ of

certiorari) and again in more emphatic terms on page 48 of his deposition taken on May 2, 1988, of record in Minnesota Supreme Court File No. C3-88-1760, Alderman flatly stated that Steinbauer made no comment of the kind attributed to him by his wife.

Counsel should recollect that, on July 5, 1988, her client, acting as a disciplinary prosecutor, after having taken Alderman's deposition and being fully aware of its contents, released three official determinations, identical in text, which are of record in Minnesota Supreme Court File No. C3-88-1760 as respondent's items 61-63: on page 9 thereof, her client gave the public the impression that the remarks attributed by Alderman to a law partner of Rathke were an expression of "great confidence, not corruption." And as earlier explained on pages 37-39 of the petition for writ of certiorari, the referee and justices of the Minnesota Supreme Court have described this damning evidence as a

little "scrap" or "snip" of party talk.

It may be noted that, on January 28, 1990, the Canadian Judicial Council announced that proceedings are underway for removal of five justices of the Nova Scotia Court of Appeal, to be consummated on bills of address in Parliament, because of not dissimilar misrepresentations of the record in the cause of Donald Marshall, on the motive of protecting the judicial system at the expense of an innocent citizen. Verification may be obtained by writing to the council at 112 Kent Street in Ottawa, Ontario K1A OW8 Canada.

2. As has been shown on pages 13-14 and 36-40 of the petition for writ of certiorari, the petitioner was punished on the basis of findings with which he was never served, as prescribed by Rules 1(8) and 14(e), MRLPR, to his great prejudice, and this runs against the thrust of Bouie v. Columbia, 378 U. S. 347 at 352 (1964).

Rules 1(8) and 14(e) say that, before

the time can run on ordering a transcript to contest findings, the referee must "notify" the lawyer subject to discipline, and "notify" means personal notice, or mailed notice to attorney registration address, or mailed notice to last known address.

The record of this cause shows that was no personal notice to the petitioner of the referee findings, and no notice by mail on the petitioner, either at his registered address filed with the Minnesota Supreme Court, or at his personal address in Canada, these latter addresses being identical. The petitioner says this denies him Fourteenth Amendment Due Process.

But on page 15 of the brief in opposition, counsel asserts, "The contention borders on the absurd," then continues, "In this litigation, the last known address for the petitioner was that of his counsel, so the literal language of the rule was satisfied."

Counsel knows perfectly well and dares

not to deny that her client, as director of lawyers professional responsibility, was at all times aware of the petitioner's address in the Village of St-Agapit in the Province of Quebec, and that the petitioner had taken great pains to make sure that both her client and his counsel knew exactly where he could be reached by telephone or by mail. When counsel states that the petitioner's last known address was that of his counsel, she is not entirely forthright.

3. On pages 16 and 17 of the brief in opposition, counsel states that the petitioner waived his objections to the charges by failure to file a motion for more definite statement prior to the referee hearing.

Aside from the fact that the Minnesota Rules of Lawyers Professional Responsibility do not provide for such prehearing motions, as counsel should be aware, she knows that the petitioner has never objected to the form of the accusation as pleaded, and as repro-

duced on pages A47-A62 of the appendix to the petition for writ of certiorari. The charges are set forth in terms of ultimate fact and in separate counts, and they say exactly what the petitioner was accused of. He was accused of impugning the integrity of two judges, a public prosecutor, and the latter's counsel, with reckless disregard for the truth in three specified documents. He was accused of this, and nothing else. Only the operative language of Rule 8.2 of the ABA Model Rules was used. And for reasons set forth on pages 30-36 of the petition for writ of certiorari, even laying aside absolute privilege, the petitioner was acquitted under ABA standards.

All we need is a little law as applied to this record, and, if a little law is not available in the highest court of the land, where can it be found?

4. On pages 18 and 19 of the brief in opposition, counsel says that there is no absolute immunity from penal prosecutions by

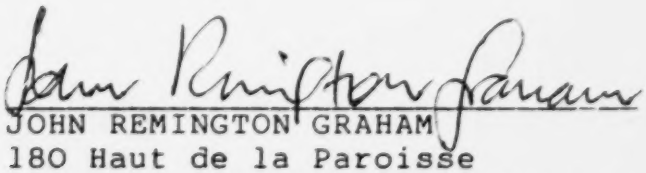
public magistrates against those who petition government for redress of grievances. Her ipse dixit ignores the 5th Article of the English Bill of Rights of 1689. Her ipse dixit ignores Holt v. Virginia, 381 U. S. 131 (1965), which is indistinguishable from this cause. Then she wavers, and seems to concede that such absolute immunity may exist with respect to criminal prosecutions and contempt citations, but arbitrarily draws a line on attorney discipline proceedings.

There is no cogent distinction between the seven bishops in 1688, and the petitioner's efforts in 1988. A lawyer is not less protected by the constitution in the enjoyment of his substantive rights than a clergyman or a plumber. Nor is it novel to say this essential right, whenever applicable, is a bar to lawyer discipline proceedings, especially in Minnesota. And counsel will not deny that, of public record in this cause (page A1 of respondent's appendix in Minnesota Supreme Court File No.

C3-88-1760), an official document is found in which the director of lawyers professional responsibility in Minnesota, under whom her client worked earlier in his career, conceded absolute immunity, as a right under the First Amendment, to an attorney who petitioned the state house of representatives for a bill of impeachment against a state district judge.

The immunity is so obvious that only the ugly and repressive mentality of the 1980s has been strong enough to create a temptation to invade its precincts after a flourishing existence without challenge, question, protest or dissent for three hundred years. A writ of certiorari will set things straight.

Respectfully submitted,



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